Supreme Court, U.S.
FILED
JAN 22 2008
OFFICE OF THE CLERK

81

No. 07-1953

In The
Supreme Court of the United States

CITIZENS UNITED, *Appellant,*
v.
FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
for the District of Columbia

Jurisdictional Statement

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Jeffrey P. Gallant
Clayton J. Callen
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434 (telephone)
812/235-3685 (facsimile)
Counsel for Citizens United

Questions Presented

1. Whether as-applied challenges to the disclosure requirements (reporting and disclaimers) imposed on electioneering communications by the Bipartisan Campaign Reform Act of 2002 ("BCRA") are foreclosed by *McConnell*'s statement that it was upholding the disclosure requirements against facial challenge "'for the entire range of electioneering communications' set forth in the statute." Mem. Op., App. 15a (quoting *McConnell v. FEC*, 540 U.S. 93, 196 (2003)).

2. Whether the disclosure requirements imposed on electioneering communications by BCRA are unconstitutional as applied to broadcast advertisements protected against prohibition by the appeal-to-vote test of *Wisconsin Right to Life v. FEC*. 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*"), because such communications are protected "political speech," not regulable "campaign speech," *see, e.g., id.* 2659 (distinguishing the two types of speech), and therefore are not "unambiguously related to the campaign of a particular federal candidate." *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

3. Whether the District Court erred in denying Citizens United a preliminary injunction to protect its broadcast advertisements against application of BCRA's disclosure requirements for electioneering communications.

Parties to the Proceedings

The names of all parties to the proceeding in the court below whose judgment is sought to be reviewed are contained in the caption of this case. Rule 14.1(b).

Corporate Disclosure Statement

Citizens United has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

Table of Contents

Introduction 1

Opinions Below 3

Jurisdiction 3

Constitutional & Statutory Provisions 3

Statement of the Case 4

The Questions Presented Are Substantial 15

I. Cases of This Sort Must Be Decided and Appealed as Preliminary Injunctions 15

II. As-Applied Constitutional Challenges to BCRA Are Permitted 17

III. Disclosure May Not Be Compelled for Non-"Campaign Speech" 18

IV. Citizens United Should Have Received a Preliminary Injunction 22

A. There Is Likely Success on the Merits ... 24

B. The Other Injunction Elements Are Met 25

Conclusion 28

Appendix

Order (Doc. 38) 1a

Memorandum Opinion (Doc. 39) 2a

Ad Script – "Wait" 3a

Ad Script – "Pants" 4a

Ad Script – "Questions" 4a

Errata (Doc. 40) 19a

Notice of Appeal to U.S. Supreme Court (Doc. 41) 20a

U.S. Constitution, First Amendment 21a

2 U.S.C. § 434(f)(1)-(3) 22a
2 U.S.C. § 441d 26a
BCRA § 403 ..... 28a
11 C.F.R. § 100.29 ..... 29a
11 C.F.R. § 110.11(a)-(c) 36a

Table of Authorities

Cases

Apotex Inc. v. U.S. Food and Drug Admin., – F. Supp. 2d –, WL 2695006 (D.D.C. 2007) 23

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 22

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290 (D.C. Cir. 2006) 23-25

Delaware & H. Ry. Co. v. United Transp. Union, 450 F. 3d 603 (D.C. Cir. 1971) 26

Elrod v. Burns, 427 U.S. 347 (1976) 23

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 27

McConnell v. FEC, 540 U.S. 93 (2003) ..... *passim*

New York Times v. Sullivan, 376 U.S. 254 (1964) 21

Thornhill v. Alabama, 310 U.S. 88 (1940) 21

Wisconsin Right to Life v. FEC. 127 S. Ct. 2652 (2007) ("*WRTL II*") ..... *passim*

Wisconsin Right to Life v. FEC, 546 U.S. 410 (2006) ("*WRTL I*") 1, 16, 17

Constitution, Statutes, Regulations & Rules

2 U.S.C. § 431(17) 19

2 U.S.C. § 434(f) 4

2 U.S.C. § 434(f)(1)-(3) 4

2 U.S.C. § 434(f)(3) 8

2 U.S.C. § 441d 4

2 U.S.C. § 441d(a) 4

11 C.F.R. § 100.29 ..... 4, 8

11 C.F.R. § 104.20 12

11 C.F.R. § 110.11 9

11 C.F.R. § 110.11(a)-(c) 9

11 C.F.R. § 114.2(a)-(c) 4

11 C.F.R. § 114.10 5

11 C.F.R. § 114.15 12

11 C.F.R. § 114.15(b)(1) 11

11 C.F.R. § 114.15(b)(1) 11

11 C.F.R. § 114.15(b)(2) 11

11 C.F.R. § 114.15(b)(3)(ii) 11

26 U.S.C. § 501(c)(3) 4

26 U.S.C. § 501(c)(4) 4

28 U.S.C. § 1253 3

Bipartisan Campaign Reform Act of 2002 ("BCRA") ..... *passim*

BCRA § 201 4

BCRA § 311 4

BCRA § 403 4

Supreme Court Rule 14.1(b) ..... (ii)

Supreme Court Rule 29.6 ..... (ii)

U.S. Const. amend. I ..... *passim*

Other Authorities

James Bopp, Jr. & Richard E. Coleson, *Comments of the James Madison Center for Free Speech on Notice of Proposed Rulemaking 2007-16 (Electioneering Communications)* (Sep. 29, 2007) 2

Club for Growth PAC, *Advisory Opin. Req.*, AO

2007-33 13

FEC Advisory Opinion 2004-30 6

FEC Office of General Counsel, *Draft Advisory Opinion, Agenda Document Number 08-03* 14

http://gullfoss2.fcc.gov/ecd 8

http://www.fec.gov/info/charts_ec_dates_ prez.shtml 8

http://www.fcc.gov/law/law_rulemakings.shtml#cc07 11

http://www.washingtontimes.com/article/20080115/NATION/513973288 10

Introduction

This is an appeal of the denial of a preliminary injunction, but that procedural posture does not diminish the importance of this case or the need for this Court to decide the questions presented. In fact, it makes it more urgent because this Court recognized in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, (2007) ("*WRTL II*"), that cases involving electioneering communications will usually be brought in eve-of-election, preliminary-injunction contexts, *id.* at 2665-67 (controlling opinion of Roberts, C.J., joined by Alito, J.), 2705 (Souter, J., joined by Stevens, Ginsburg & Breyer, dissenting), and they will need to be resolved expeditiously in that context if effective protection of core First Amendment rights is to be provided. Otherwise, as happened to Wisconsin Right to Life, rights may be vindicated at some later date when the need to speak that gave rise to the challenge has been irretrievably lost.

Just as happened to Wisconsin Right to Life with its anti-filibuster ads, *see Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*") (per curiam), the FEC is again arguing, and the district court is agreeing, App. 15a, that facial-holding language in *McConnell v. FEC*, 540 U.S. 93 (2003), precludes as-applied challenges to a BCRA electioneering communication provision. This Court needs to quickly reverse this rejection of its unanimous *WRTL I* holding that a *McConnell* facial decision could *not* decide as-applied challenges, which holding applies equally here.

Buckley v. Valeo, 424 U.S. 1 (1976), held that expenditures may not be subject to compelled disclosure unless they are for communications "unambiguously

related to the campaign of a particular federal candidate," *Id.* at 80 (imposing the express advocacy construction to avoid "too remote" and "impermissibly broad" application of disclosure requirements). And *WRTL II* held that communications that are protected under its test ("susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," 127 S. Ct. at 2667) are protected "political speech" (also described as "issue advocacy"), *not* "campaign speech," *see, e.g., id.* at 2673, also described as "electioneering." *Id.* at 2667-69. Yet the FEC insists that speech protected by *WRTL II*'s "appeal to vote" test, so as to be neither "campaign speech" nor "electioneering," must yet be subject to disclosure requirements. The district court has followed the FEC's lead. App. 15a. This is inconsistent with *Buckley*'s "unambiguously campaign related" requirement, 424 U.S. at 81, which has been a guiding constitutional first-principle that this Court has applied in all of its campaign-finance law jurisprudence and which is equally applicable to disclosure requirements as to prohibitions.

Until December 14, 2007, it seemed possible that the FEC would not impose BCRA's disclosure requirements on electioneering communications that are protected "political speech" or "issue advocacy" under *WRTL II*'s appeal-to-vote test. The FEC was conducting rulemaking to implement this Court's *WRTL II* decision, and the rulemaking petition had urged the agency not to compel disclosure as to communications protected by *WRTL II*. *See* James Bopp, Jr. & Richard E. Coleson, *Comments of the James Madison Center for Free Speech on Notice of Proposed Rulemaking 2007-16*

(Electioneering Communications) (Sep. 29, 2007), *available at* http://www.fec.gov/pdf/nprm/electioneering_comm/2007/james_madison_center_for_free_speech_eccomment16.pdf. But on December 14, the FEC refused and adopted a final rule that applies disclosure requirements on ads protected by *WRTL II*'s appeal-to-vote test. And it has now boldly asserted that "the government's interest in providing information to the public extends beyond speech about candidate elections and encompasses *activity that attempts to sway public opinion on issues* . . . ." Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 19 (emphasis added). This case should be accepted and decided by this Court so that the Court may reject the FEC's expansive assertion of regulatory authority over all issue advocacy—all at a time when the FEC is unable to even give advisory opinions because it lacks enough commissioners to have a quorum.

Opinions Below

The district court's unreported order and opinion denying preliminary injunction are reprinted in the Appendix at 1a and 2a.

Jurisdiction

The preliminary injunction motion was denied January 15, 2008. App. at 1a. Citizens United noticed appeal to this Court on January 16, 2008. App. at 20a. This Court has appellate jurisdiction over the interlocutory order of the three-judge court appointed under BCRA § 403. 28 U.S.C. § 1253.

Constitutional & Statutory Provisions

The following constitutional amendment, statutes, and regulations are appended (page numbers in brack-

ets): U.S. Constitution, First Amendment [21a]; 2 U.S.C. § 434(f)(1)-(3) [22a]; 2 U.S.C. § 441d [26a]; BCRA § 403 [28a]; 11 C.F.R. § 100.29 [29a]; 11 C.F.R. § 114.2(a)-(c) [36a].

Statement of the Case

This is an as-applied challenge to the constitutionality of **(a)** BCRA **§ 201**, 116 Stat. 88 (entitled "Disclosure of Electioneering Communications"), which added a new subsection "(f)" to § 304 of the Federal Election Campaign Act ("FECA") that requires reporting of electioneering communications and **(b)** BCRA **§ 311**, 116 Stat. 105, requiring that electioneering communications contain "disclaimers." *See* 11 C.F.R. § 110.11. BCRA **§ 201** is called herein the "**Reporting Requirement**," BCRA **§ 311** is called the "**Disclaimer Requirement**," and the requirements together are called the "**Disclosure Requirements**" for ease of identification. The Reporting Requirement is codified at 2 U.S.C. § 434(f). App. 22a. The Disclaimer Requirement is codified at 2 U.S.C. § 441d(a). App. 26a.

Plaintiff Citizens United is a nonstock, nonprofit (under 26 U.S.C. § 501(c)(4)), membership, Virginia corporation with its principal office in Washington, District of Columbia. Defendant Federal Election Commission ("FEC") is the government agency with enforcement authority over FECA.

Citizens United was founded in 1988. Its purpose is to promote the social welfare through informing and educating the public on conservative ideas and positions on issues, including national defense, the free enterprise system, belief in God, and the family as the basic unit of society. Its current annual budget is about

$12 million. Citizens United has a related § 501(c)(3) entity called Citizens United Foundation ("CUF").

Citizens United is not a "qualified nonprofit corporation" because it receives corporate donations and engages in business activities. *See* 11 C.F.R. § 114.10 (exempting certain ideological, nonstock, nonprofit corporations from the electioneering communication prohibition).

One of the principal means by which Citizens United fulfills its purposes is through the production and distribution of documentary films. Its first major documentary film, in 2004, was entitled *Celsius 41.11: The Temperature at Which the Brain Begins to Die.* The film was a conservative response to Michael Moore's documentary *Fahrenheit 9/11* and was shown in over 100 theaters in 2004. It continues to be sold in DVD format. In 2005, Citizens United and CUF co-produced *Broken Promises: The United Nations at 60*, which was an exposé on the United Nations narrated by noted actor Ron Silver. This film was released in DVD format. In 2006, Citizens United and CUF co-produced two films: *Border War: The Battle Over Illegal Immigration* and *ACLU: At War With America. Border War* had a limited theatrical release and was sold on DVD. *ACLU* was released only in DVD format.

Broken Promises and *Border War* have competed for and won a number of awards from the motion picture industry. *Broken Promises* won a Special Jury Remi Award at the 2006 Houston International Film Festival. *Border War* won best feature documentary at the 2006 Liberty Film Festival, a Silver Remi Award at the 2007 Houston International Film Festival, and best feature documentary film honors from the American

Film Renaissance in February 2007. *Border War* also qualified for consideration under the Academy of Motion Picture Arts and Sciences' demanding criteria for nomination to the 79th Academy Awards in February 2007.

In 2007, CUF produced *Rediscovering God in America*, which is narrated by Newt and Calista Gingrich. This film premiered in Washington, D.C., and New York City and is now available in DVD format only. As of December 11, 2007, the film was the top selling historical documentary on Amazon.com.

In January 2008, Citizens United released a feature length documentary film on Senator Hillary Clinton entitled *Hillary: The Movie*. It is currently being shown in theaters and sold on DVDs. It includes interviews with numerous individuals and many scenes of Senator Clinton at public appearances. It is about 90 minutes in length. It does not expressly advocate Senator Clinton's election or defeat, but it discusses her Senate record, her White House record during President Bill Clinton's presidency, and her presidential bid. Some interviewees also express opinions on whether she would make a good president. A compendium book is being published by Thomas Nelson Publishers, which has purchased the book rights to the film and is paying Citizens United an advance royalty on sales.

When Citizens United produced *Celsius 41.11* in 2004, it ran national broadcast ads promoting the film. The original version of the ads had images and sound bites of President George Bush and Senator John Kerry, but those images and sound bites had to be deleted from the ads due to the electioneering communication prohibition. Prior to running the ads, Citizens

United received FEC Advisory Opinion 2004-30, stating that its film ads would qualify as electioneering communications and would not be exempt under the Press Exemption.

Citizens United intends to fund three television ads ("Ads")[1] to promote *Hillary: The Movie* that will meet

---

[1]The script for "**Wait**" (10 seconds) follows:

[Image(s) of Senator Clinton on screen]

"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie."

[Film Title Card]

[Visual Only] Hillary: The Movie.

[Visual Only] www.hillarythemovie.com.

"**Pants**" (10 seconds) is as follows:

[Image(s) of Senator Clinton on screen]

"First, a kind word about Hillary Clinton: [Ann Coulter Speaking & Visual] She looks good in a pant suit."

"Now, a movie about everything else."

[Film Title Card]

[Visual Only] Hillary: The Movie.

[Visual Only] www.hillarythemovie.com.

"**Questions**" (30-seconds) is as follows:

[Image(s) of Senator Clinton on screen]

"Who is Hillary Clinton?"

[Jeff Gerth Speaking & Visual] "[S]he's continually trying to redefine herself and figure out who she is . . ."

[Ann Coulter Speaking & Visual] "[A]t least with Bill Clinton he was just good time Charlie. Hillary's got an agenda . . ."

[Dick Morris Speaking & Visual] "Hillary is the closest thing we have in America to a European socialist . . ."

"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie.

the electioneering communication definition at 2 U.S.C. § 434(f)(3). Citizens United has not, and will not, coordinate the production and broadcast of the Ads with any candidate, campaign committee, political committee, or political party.

The Ads will meet the electioneering communication definition at 2 U.S.C. § 434(f)(3) (and 11 C.F.R. § 100.29), because they (a) will be broadcast on Fox News cable and major network stations so that they (b) will be receivable by more than 50,000 persons, *see* http://gullfoss2.fcc.gov/ecd (Federal Communications Commission's Electioneering Communications Database), in states where caucuses, conventions, or primary elections will be selecting a party nominee, (c) will clearly reference Senator Clinton, a Democratic presidential candidate, and (d) will be made within 30 days before presidential primary elections in a series of states, depending on when the requested judicial relief is permitted, so the Ads may not be broadcasted without being burdened by the Disclosure Requirements. *See* http://www.fec.gov/info/charts_ec_dates_prez.shtml (electioneering communication periods).

Citizens United will broadcast the 30-second ad entitled "Questions" on Fox News cable, and may broadcast it on major television network stations, too. Citizens United will broadcast the 10-second ads "Wait" and "Pants" on major television network stations, but not on Fox News.

[Film Title Card]

[Visual Only] Hillary: The Movie. In theaters [on DVD] January 2007.

[Visual Only] www.hillarythemovie.com.

The disclaimer language mandated by FEC rule, *see* 11 C.F.R. § 110.11, takes about 4 seconds to narrate, making 10-second ads virtually impossible and 30-second ads extremely difficult to do and have any significant time left for substantive communication.[2]

Citizens United's Ads reference www.hillarythemovie.com, which promotes showings of *Hillary: The Movie* in theaters and sales of *Hillary* on DVD. The DVD is also available from major national retailers, such as Amazon.com.

Citizens United wanted to begin running its Ads from mid-December 2007 to mid-January 2008 for its initial media buy. Citizens United now intends to begin broadcasting its ads during electioneering communication periods when it gets the relief requested herein. If Senator Clinton becomes the presidential nominee of her party, Citizens United plan to run the Ads (and possibly materially-similar ads) on Fox News cable (and possibly other broadcast outlets) within 30 days before the Democratic National Committee Convention (the electioneering communication period is July 29 to August 28, 2008) and within 60 days of the November general election (the electioneer-

---

[2]The disclaimer requires (1) a spoken statement that "Citizens United is responsible for the content of this advertising," and (2) a written statement appearing on screen stating (a) "the name and permanent street address, telephone number or World Wide Web address of the person who paid for the communication," (b) a statement that the communication is "not authorized by any candidate or candidates committee," and (c) a "clearly readable" statement that "Citizens United is responsible for the content of this advertising." 11 C.F.R. § 110.11(a)-(c).

ing communication period is September 5 to November 4, 2008). At these times, the Ads will also meet the electioneering communication definition. Citizens United believes that these are the times when the public's interest in Senator Clinton will be at its peak, which is the key to maximizing box office and DVD sales for *Hillary*.

Citizens United is in the process of making a documentary film about presidential candidate Senator Barack Obama, which it intends to have ready for release by June 2008.[3] Citizens United will have ads that are substantially similar to the Ads for *Hillary* to promote its Senator Obama documentary, but it cannot offer its ads for judicial review in advance because they are not prepared. They will not be prepared until the movie is completed because they will be based on scenes from the documentary. Nor can Citizens United seek an advisory opinion on these ads because they are neither begun nor completed and because the FEC is, for the foreseeable future, unable to issue advisory opinions due to an insufficient number of commissioners. These ads will also be run during electioneering communication periods and subject to the Disclosure Requirements.

---

[3]Citizens United moved for leave to file an affidavit updating the facts of this case on January 9, 2008 (Doc. 35 (with affidavit attached)), including the details about the Senator Obama documentary, but the district court denied the motion (Doc. 36). *See also* Robert Stacey McCain, *'Hillary' Producer is Ready for Obama, Too*, Wash. Times, Jan. 15, 2008, *available at* www.washingtontimes.com/article/20080115/NATION/513973288 (information re Citizens United's documentary).

In addition to being protected issue advocacy, the Ads meet the requirements of the recently-enacted FEC rule recognizing a commercial-transaction, safe-harbor exception to the electioneering communication prohibition because each (**a**) "[p]roposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event," 11 C.F.R. § 114.15(b)(3)(ii); (**b**) "[d]oes not mention any election, candidacy, political party, opposing candidate, or voting by the general public," *id.* at § 114.15(b)(1); and (**c**) "[d]oes not take a position on any candidate's or officeholder's character, qualifications, or fitness for office." *Id.* at § 114.15(b)(2).

The FEC concedes that the two 10-second ads fit its regulatory commercial transaction exception, but it asserts that the 30-second ad, "Questions," does not fall within that safe harbor. Opp'n to 2d Mot. for Prelim. Inj. (Doc. 33) at 17. However, the FEC does concede that "on balance" the "Questions" ad is protected from prohibition under *WRTL II*'s appeal-to-vote test (127 S. Ct. at 2667). *Id.* Seven days after this suit was filed, the FEC was unsure whether the "Questions" was a protected ad—under its regulatory test or *WRTL II*'s test—and declared that it needed more time to make up its mind. Opp'n to Mot. for Consol'n (Doc. 19) at 8. Seventeen days later, the FEC finally concluded that the 30-second ad was protected under *WRTL II*.

The Ads, however, are still subject to BCRA's Disclosure Requirements because the FEC has recently refused to exclude from disclosure "electioneering communications" that meet this Court's appeal-to-vote test. *See* http://www.fec.gov/law/law_rulemakings.

shtml#ec07 (rulemaking documents, including requests to eliminate disclosure for ads not subject to electioneering communication prohibition). Notably, two commissioners voted against compelling disclosure for ads protected by *WRTL II*, but they were outvoted by other commissioners who wanted to require disclosure. *See Minutes of FEC Open Mtg.* (Nov. 20, 2007), *available at* http://www.fec.gov/agenda/2007/approve 07-79.pdf.

One of the chief concerns with the Reporting Requirement is the compelled disclosure of donors who may then be subject to various forms of retaliation by political opponents, a concern that *Buckley* recognized as inherent in compelled disclosure, whether or not it rises to the level of harassment proven by certain historically unpopular groups. 424 U.S. at 64.

Citizens United will have donors that it will be required to disclose (as to name and address), absent the judicial relief requested here, because it will pay for the Ads "exclusively from a segregated bank established to pay for electioneering communications permissible under 11 C.F.R. § 114.15" (rule implementing *WRTL II* by permitting corporate electioneering communications), to which donors will have "donated an amount aggregating $1,000 or more . . . since the first day of the preceding calendar year." 11 C.F.R. § 104.20.[4]

---

[4]The present case is far from moot, but it is important to note that Citizens United's need for judicial relief will be ongoing because it also intends to broadcast materially-similar ads mentioning public figures who are candidates in materially-similar situations during future electioneering communication periods when public interest is at a peak.

Citizens United intends to broadcast its Ads without complying with the Disclosure Requirements, but it will not broadcast its Ads if it does not obtain the judicial relief presently requested. Instead, Citizens United will be forced to include the compelled speech of a disclaimer, which (**a**) requires it to mislead the public by identifying its speech as electioneering speech when it is not because this Court has held that such speech is not sufficiently related to elections to be regulated as electioneering and (**b**) deprives Citizens United of valuable time in its short and expensive broadcast Ads, which deprivation and burden is not justified by any constitutional or congressional authority. Adding the disclaimer will preclude Citizens United from running its 10-second ads[5] and will

---

There is a strong likelihood that such similar situations will recur, given the facts that Plaintiff has engaged in similar activity in the past and that such activity is common and regularly recurring for it—as are conflicting electioneering communication periods.

[5]On November 15, 2007, Club for Growth PAC ("CFG-PAC") requested an FEC advisory opinion granting an exemption from disclaimer requirements for 10- and 15-second televised independent expenditure ads. CFG-PAC stated that the disclaimers "severely curtail[]" its speech as 31.6% to 36.9% of 10-second ads would be consumed by the spoken disclaimer. CFG- PAC also noted how such short "TV spots are important in the current media landscape with multiplication of viewing choices, increased competition from the Internet, and ever increasing costs." Club for Growth PAC, *Advisory Opin. Req.*, AO 2007-33, *available at* www. fec.gov (Pending Advisory Opinion Requests). The request is still pending and has been placed on the agenda

require it to revise its 30-second ad so as to be much less effective—both as to the issue advocacy contained in it and as a vehicle for promoting *Hillary: The Movie.*

And Citizens United will be compelled to file reports of its activity, which (1) requires it to mislead the public by reporting its speech as campaign speech when it is not; (2) deprives Citizens United of valuable time and resources in complying with reporting requirements, which deprivation and burden is not justified by any constitutional or congressional authority; and (3) will, in Citizens United's belief, based on long experience, substantially reduce the number of donors and amount of donations to Citizens United because many potential donors do not wish to be publicly so identified for a variety of legitimate reasons.

In such an event, Citizens United will be deprived of its constitutional rights under the First Amendment to the United State Constitution by these substantial burdens on its highly-protected, core "political speech," *WRTL II*, 127 S. Ct. at 2659 (twice), 2660, 2664, 2665 (thrice), 2666 (twice), 2669, 2671-74, and will suffer irreparable harm. There is no adequate remedy at law.

The procedural history, as relevant to the present appeal, is that, based on these facts and claims, Citi-

---

for the Commission's January 24, 2008 meeting. The draft advisory opinion submitted by the FEC Office of General Counsel argues against the exemption. *See* FEC Office of General Counsel, *Draft AO*, Agenda Doc. No. 08-03, *available at* www. fec.gov (Pending Advisory Opinion Requests). Of course, the FEC lacks sufficient commissioners to issue a formal advisory opinion.

zens United filed its *Verified Complaint for Declaratory and Injunctive Relief* on December 13, 2007, and moved, inter alia, for a preliminary injunction (Doc. 5), expedition (Doc. 4), and consolidation of the hearing on the preliminary injunction with the hearing on the merits (Doc. 6). The consolidation motion was denied (Doc. 29) and the preliminary injunction motion, as to broadcasting the Ads without the burdens of the Disclosure Requirements, was denied on January 15, 2008. App. 1a. The district court relied primarily on its assertions that *McConnell* precluded as-applied challenges and *WRTL II* didn't decide the disclosure issue. Mem. Op., App. 15a. On January 16, 2008, a notice of appeal was filed. App. 20a.

The Questions Presented Are Substantial

While Citizens United suffers substantial harm to its First Amendment rights because it was denied injunctive relief, the substantial questions raised in this appeal also include vindication of core political rights generally and proper application of this Court's precedents by federal courts and agencies.

I. Cases of This Sort Must Be Decided and Appealed as Preliminary Injunctions.

This is an appeal of the denial of a preliminary injunction. That does not diminish the importance of this case or the need for this Court to decide the questions presented.

In *WRTL II*, Wisconsin Right to Life originally sought a preliminary injunction in order to broadcast its anti-filibuster, grassroots-lobbying ads at an effective time. The District Court first dismissed that case, deciding that certain facial-challenge language in

McConnell, 540 U.S. 93, precluded as-applied challenges, which this Court reversed. *WRTL I*, 546 U.S. 410. Ultimately, this Court decided in the summer of 2007 that WRTL's ads were constitutionally protected all along, so that WRTL should have been able to broadcast them in the summer of 2004. *WRTL II*, 127 S. Ct. 2652. For that to have happened, WRTL should have gotten a preliminary injunction, expeditiously followed by declaratory and permanent injunctive relief.

WRTL II recognized that, given the eve-of-election definition of electioneering communications, there would be a need for expeditious judicial relief in that context, so the opinion set out standards for speedy resolution of challenges. *Id.* at 2665-67. And the dissent expressly pointed to preliminary injunctions as the remedy for making such challenges workable. *Id.* at 2705 (Souter, J., joined by Stevens, Ginsburg & Breyer, dissenting). The necessary implication is that preliminary injunctions *should* be available in such cases and should not be rejected based on standards that would make it impossible for a preliminary injunction to *ever* be granted.

In the context of electioneering communications, by definition, and core political speech in general, the rejection of a preliminary injunction motion will often deny a group's ability to engage in timely protected political speech—as happened to WRTL as to the timely broadcast of its anti-filibuster ads in the summer of 2004. Protection of core political speech in this context requires that preliminary injunctions be readily available to protect such speech. This is a substantial issue.

II. As-Applied Constitutional Challenges to BCRA Are Permitted.

Despite this Court's expeditious, unanimous rejection of a nearly-identical argument in *WRTL I*, 546 U.S. 410, the FEC is again arguing, and the district court is agreeing, that *McConnell*'s facial upholding of the BCRA Disclosure Requirements on electioneering communications precludes future as-applied challenges. The effect of the lower court's ruling is to bar all future as-applied challenges, at least in the District of Columbia.

Specifically, the district court decided, App. 15a, that Citizens United did not have a substantial likelihood of success on the merits because this Court said in *McConnell* that "*Buckley* amply supports application of FECA § 304's disclosure requirements to the *entire range* of 'electioneering communications.'" 540 U.S. at 196 (emphasis added). Of course, this is facial-challenge language, closely akin to the *McConnell* statement at issue in *WRTL I*: "We uphold *all applications* of the primary definition and accordingly have no occasion to discuss the backup definition." *McConnell*, 540 U.S. at 190 n.73. *WRTL I* rejected the district court's notion that such facial-challenge language precluded as-applied challenges, concluding that "[i]n upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges." *WRTL I*, 546 U.S. at 411-12.

This Court needs to decide whether as-applied challenges to the Disclosure Requirements continue to be available, consistent with *WRTL I*, or whether such challenges are precluded by *McConnell*'s facial deci-

sion. This is a substantial issue.

III. Disclosure May Not Be Compelled for Non-"Campaign Speech."

Buckley held that expenditures may not be subjected to compelled disclosure unless they are for communications "unambiguously related to the campaign of a particular federal candidate," 424 U.S. at 80. To assure that "the relation of the information sought to the purposes of the Act [was not] too remote," *id.*, this Court imposed the express advocacy construction:

> To insure that the reach of § 434(e) [requiring disclosure of expenditures] is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of § 608(e) to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is *unambiguously related* to the *campaign* of a particular federal candidate. [*Id.* (emphasis added; footnote omitted).]

The Court returned to this "unambiguously related" language in summing up its analysis of the expenditure disclosure provision, indicating that, as construed, the provision "shed[s] the light of publicity on spending that is *unambiguously campaign related.*" *Id.* at 81 (emphasis added).

Buckley applied this unambiguously-campaign-related requirement to (1) expenditure limitations, *id.* at 42-44; (2) PAC status and disclosure, *id.* at 79; (3) non-PAC *disclosure* of contributions and independent

expenditures,[6] *id.* at 79-81; and (4) contributions. *Id.* at 23 n.24, 78 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act [regulating elections], for they are connected with a candidate or his campaign."). Because *Buckley* expressly applied this unambiguously-campaign-related requirement to the *disclosure of expenditures*, *id.* at 80, it has direct application here.

Buckley employed two tests to implement this unambiguously-campaign-related requirement. First, to implement the requirement for PAC status, the Court created the major-purpose test for "political committees": "To fulfill the purposes of the Act [regulating elections] they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79. "Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, *campaign related.*" *Id.* (emphasis added). This test assures that expenditures are "unambiguously related to the campaign of a particular federal candidate." *Id.* at 80. Second, to implement the unambiguously-campaign-related requirement as to expenditures, the Court created the express-advocacy test, i.e., whether a communication contains explicit words expressly advocating the election or defeat of a clearly identified candi-

---

[6] "Independent expenditure" is a term of art referring to an express-advocacy communication that is not coordinated with a candidate so as to become a contribution. *See* 2 U.S.C. § 431(17).

date. *Id.* at 44, 80.

WRTL II applied the unambiguously-campaign-related requirement to eliminate overbreadth in the regulation of BCRA's new "electioneering communications" when it stated its test for functional equivalence: "[A]n ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667. *WRTL II* reiterated the requirement when it said that the corporate-form corruption interest does not "extend[] beyond *campaign* speech." *Id.* at 2672 (emphasis added). So *WRTL II*'s appeal-to-vote test is the application of the unambiguously-campaign-related requirement to electioneering communications, just as the express-advocacy test was the Court's application of the requirement to reporting independent expenditures and the major-purpose test was the application of the requirement to PAC disclosure.

WRTL II also reaffirmed that the purpose of the unambiguously-campaign-related requirement—and its appeal-to-vote test applying it—is twofold. Negatively, it confines government within the pale of its constitutional authority to regulate elections. *Buckley*, 424 U.S. at 13 ("The constitutional power of Congress to *regulate federal elections* is well established and is not questioned by any of the parties in this case." (footnote omitted; emphasis added)). Positively, it protects what the Court calls "'genuine issue ads,'" *WRTL II*, 127 S. Ct. at 2659 (*quoting McConnell*, 540 U.S. at 206 & n.88), 2668 (same), 2673 (same), or "issue advocacy." *Id.* at 2667. *WRTL II* explained that "[i]ssue advocacy conveys information and educates,"

id. at 2667, and reaffirmed *Buckley*'s statement that, because issue advocacy and candidate advocacy often look alike, bright-line tests are required to protect issue advocacy from being chilled, and any doubt must be resolved in favor of free speech:

> [W]e have acknowledged at least since *Buckley* . . . that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." 424 U.S. at 42. Under the test set forth above, that is not enough to establish that the ads can only reasonably be viewed as advocating or opposing a candidate in a federal election. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor. [*Id.* at 2669.]

Lest there be any doubt as to the necessity of speech-protective lines, *WRTL II* reiterated that: "the benefit of any doubt [goes] to protecting rather than stifling speech," *id.* at 2667 (*citing New York Times v. Sullivan*, 376 U.S. 254, 269-70 (1964)), "in a debatable case, the tie is resolved in favor of protecting speech," *id.* at 2669 n.7, and "the benefit of the doubt [goes to] speech, not censorship." *Id.* at 2674.

In other words, free speech about public issues, especially political ones, is so central and essential to our system of government that it is better to allow some theoretically-regulable speech to go unrestricted than to chill public debate. Thus, *WRTL II* reaffirmed what the Court held in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002): "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *WRTL II*, 127 S. Ct. at 2670 (*quoting Ashcroft*, 535 U.S. 234 at 255). To do otherwise would "'turn[] the First Amendment upside down.'" *Id.* (citation omitted).

WRTL II applied the appeal-to-vote test (an unambiguously-campaign-related test) to determine that ads protected under it are protected "political speech," i.e., "issue advocacy," *not* "campaign speech," i.e., "electioneering." *Id.* at 2667-69, 2673. It is inconsistent with the unambiguously-campaign-related requirement to require disclosure of speech that is neither "campaign speech" nor "electioneering." Ads that are, by definition, not "electioneering" must not be treated as "*electioneering* communications" for disclosure purposes. The district court's decision otherwise raises a substantial issue.

IV. Citizens United Should Have Received a Preliminary Injunction.

Just as WRTL should have received a preliminary injunction to protect its political speech in 2004, so Citizens United should receive one now to protect its constitutionally-protected political speech from unwarranted burdens.

Four factors govern preliminary injunctions in the District of Columbia Circuit:

> To warrant preliminary injunctive relief, the moving party must show (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction. [*Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (citations omitted) (preliminary injunction standards). *See also Apotex Inc. v. U.S. Food and Drug Admin.*, – F. Supp. 2d –, WL 2695006, at *3 (D.D.C. 2007) (applying same standards for temporary restraining order).]

"A district court must 'balance the strengths of the requesting party's arguments in each of the four required areas," and "[i]f the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak." *England*, 454 F.3d at 297.[7]

---

[7] *England* cited a decision from this Court for the proposition that "'[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held," *id.* (citation omitted), but neither *England* nor the case it cited involved First Amendment expression and association rights in the core area of political speech. So the status quo argument has no applicability to the present case, which is rather governed by the holding of *Elrod v. Burns*, 427 U.S. 347, 373 (1976), that "the loss of First Amendment freedoms, for

A. There Is Likely Success on the Merits.

The FEC concedes, and the district court decided, that Citizens United's Ads are protected from the electioneering communication prohibition by *WRTL II*'s appeal-to-vote test. App. 14a.

This leaves the purely legal question of whether "electioneering communications" that do not contain an "appeal to vote," 127 S. Ct. at 2667, may still be subject to compelled disclosure. Since the Ads are not an "appeal to vote," then necessarily under *WRTL II* they are protected "political speech" ("issue advocacy"), not "campaign speech," *id.* at 2673, or "electioneering," *id.* at 2667-69, and are thus not "unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80. As such, they are not subject to either prohibition or disclosure. Therefore, Citizens United has a likelihood of success on the merits, and a preliminary injunction should have been granted.

Instead, the district court ignored the constitutional analysis, set forth above, as to the unambiguously-campaign-related requirement and largely ignored the argument that *WRTL II* imposed this requirement on

---

even minimal periods of time, unquestionably constitutes irreparable injury." *See England*, 454 F.3d at 299 ("*Elrod* involved political speech and freedom of expression"). Where loss of First Amendment freedoms is occurring, maintaining the status quo is unjust and unjustified. Nor does a presumption of the constitutionality of a statute apply in the face of the First Amendment's strict and intermediate standards of review, which presume unconstitutionality by requiring the government to specially justify burdens on expression and association.

electioneering communications, relying instead on the notions that *McConnell* precludes this as-applied challenge and *WRTL II* didn't decide the issue. App. 15a. This presents a substantial issue for this Court to decide.

B. The Other Injunction Elements Are Met.

The other elements for granting a preliminary injunction rise or fall with the likelihood of success on the merits. If Citizens United's arguments are sound on the merits element, then there is irreparable harm to Citizens United if relief is denied, while others will not be harmed and the public interest will be served, if relief is granted. The district court candidly acknowledged that its analysis turned on its perception of the likelihood of success on the merits: "If Citizens had made more of a showing that it had a chance of prevailing in this Court on the merits, these kinds of harms might have warranted preliminary relief." App. 17a-18a. The other elements of the preliminary injunction standard will be briefly addressed to complete the analysis.

Irreparable Harm. Citizens United will suffer irreparable harm unless it receives the requested injunctive relief. Just as in *WRTL II*, 127 S. Ct. 2652, WRTL forever lost the opportunity to broadcast its fully protected issue ads because it did not receive a preliminary injunction—which was plainly irreparable harm—so, too, will Citizens United be irreparably harmed if it is unable to run its Ads. Citizens United wishes to engage in First Amendment activities that are "'both certain and great . . . actual not theoretical,'" *England*, 454 U.S. at 297 (citation omitted), are "of such imminence that there is a 'clear and present' need

for equitable relief to prevent irreparable harm," *id.* (citation and emphasis omitted), and in which "the injury [is] beyond remediation." *Id.* Plaintiff is barred by criminal penalties from engaging in First Amendment expression and association activities it wishes to do, which "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373.

The FEC, however, argued below that Citizens United had not provided "specific evidence" of a "reasonable probability" of threats, harassment and retaliation if it's donors are disclosed, as it claims is required by *McConnell*, 540 U.S. at 198-99. Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 32-33. However, this Court held in *Buckley* that compelled disclosure involves inherent harm. 434 U.S. at 64. Furthermore, the FEC argues that, in any event, if a preliminary injunction is not granted, Citizens United would only be subject to an FEC investigation, which it claims does not constitute irreparable harm. Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 35. This argument, if accepted, would preclude all preliminary injunctions.

These issues present substantial questions for this Court to decide.

Injury to Others. The questions of harm to others and serving the public interest are, of course, inversely proportional to the likelihood of success on the merits. As the District of Columbia Circuit said in *Delaware & H. Ry. Co. v. United Transp. Union*, 450 F. 3d 603, 620 (D.C. Cir. 1971), in cases where harms are claimed on both sides, the Court should look to the merits.

However, the FEC has argued here that it will be

harmed if it is denied the opportunity to enforce a statute. Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 50. But such generalized "harm," if accepted, would always defeat a requested preliminary injunction. First Amendment protections would, therefore, often be meaningless. This presents a substantial question for this Court to decide.

Public Interest. As with harm to others, the question of the public interest follows the likelihood of success on the merits. Clearly, "[t]he First Amendment, in particular, serves significant societal interests." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 766 (1978). It is in the public interest for Americans to be able to associate and express themselves freely where there is no cognizable governmental interest justifying restriction.

The Court below, however, found that the public interest would be served here by denying a preliminary injunction because of the public's interest in disclosure. Mem. Op., App. 18a. As the FEC put it below, "the relief sought by Citizens United would prevent the achievement of Congress's goals of "'shed[ding] the light of publicity" on campaign financing,' *McConnell*, 540 U.S. at 231 (quoting *Buckley*, 424 U.S. at 81)." Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 50. But of course whether "*campaign* financing" is at issue in this case is the question before this Court on the merits. This presents a substantial question for this Court to decide.

Thus, whether a preliminary injunction is available in these instances is a substantial question. It is a concrete application of the question of whether preliminary injunctions are going to actually be available to

protect free speech in a timely manner. This question and its answer affect not just Citizens United but also the public at large at a time when rolling primaries, followed by conventions backed up to 60-day pre-general-election electioneering periods are creating extended periods of burden on free expression—expression that this Court in *WRTL II* indicated should not be so burdened.

Conclusion

For the foregoing reasons, the Court should note probable jurisdiction.

Respectfully submitted,

James Bopp, Jr.,
Counsel of Record
Richard E. Coleson
Jeffrey P. Gallant
Clayton J. Callen
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434
Counsel for Citizens United

Appendix Table of Contents

Order (Doc. 38) 1a
Memorandum Opinion (Doc. 39)* 2a
Ad Script – "Wait" 3a
Ad Script – "Pants" 4a
Ad Script – "Questions" 4a
Errata (Doc. 40)* 19a
Notice of Appeal to U.S. Supreme Court (Doc. 41) 20a
U.S. Constitution, First Amendment 21a
2 U.S.C. § 434(f)(1)-(3) 22a
2 U.S.C. § 441d 26a
BCRA § 403 ..... 28a
11 C.F.R. § 100.29 ..... 29a
11 C.F.R. § 110.11(a)-(c) 36a

*The *Memorandum Opinion* (Doc. 39) was amended by the *Errata* (Doc. 40).

[Doc. 38, filed Jan. 15, 2008]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS UNITED Plaintiff,	)	
	)	Civil Action No. 07-2240
v.	)	(ARR, RCL, RWR)
	)	(Three-Judge Court)
FEDERAL ELECTION COMMISSION, Defendant.	)	

ORDER

Now before the Court comes plaintiff Citizens United's motions [5 and 23] for preliminary injunction seeking to enjoin defendant Federal Election Commission from enforcing challenged provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Upon consideration of the parties' filings, oral argument, the applicable law, and the facts of this case, it is hereby

ORDERED that motion [5] for preliminary injunction is DENIED. It is further hereby

ORDERED that motion [23] for preliminary injunction is DENIED as moot with respect to BCRA § 203 as applied to plaintiff's "Questions" ad, and DENIED with respect to the remaining challenges.

SO ORDERED.

Signed by United States Circuit Judge A. Raymond Randolph, and United States District Judges Royce C.

Lamberth and Richard W. Roberts, on January 15, 2008.

[*Editor's Note: The following Memorandum Opinion (Doc. 39) was amended by an Errata (Doc. 40). Editing notes of the changes are included in the following text.*]

[Doc. 39, filed Jan. 15, 2008]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS UNITED Plaintiff,	)	
	)	Civil Action No. 07-2240
v.	)	(ARR, RCL, RWR)
	)	(Three-Judge Court)
FEDERAL ELECTION COMMISSION, Defendant.	)	

MEMORANDUM OPINION

For the reasons that follow we deny Citizens United's ("Citizens") motions for a preliminary injunction to enjoin the Federal Election Commission ("FEC") from enforcing provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"),[1] with respect to Citizens'

---

[1] Pub. L. No. 107–155, 116 Stat. 81 (2002), codified at 2 U.S.C. § 431 *et seq.*

advertisements for a movie—*Hillary: The Movie*—and its distribution of *The Movie* through cable TV video on-demand.

I.

Citizens United is a nonprofit membership corporation, tax-exempt under Internal Revenue Code § 501(c)(4). (Am. Compl. ¶ 5.) Citizens produced a movie titled *Hillary: The Movie*. (*Id.* Ex. 2; Notice [30] Regarding Joint Stip.) *The Movie* focuses on Senator Hillary Rodham Clinton's "Senate record, her White House record during President Bill Clinton's presidency, . . . her presidential bid," and includes "express opinions on whether she would make a good president." (Am. Compl. ¶ 14.) Citizens plans to distribute *The Movie* in January or [*2] February 2008 through theaters, video on-demand ("VOD") broadcasts, and DVD sales. (*Id.*) Citizens notified the court on January 7, 2008, that it had released *The Movie* for "public sale and exhibition." (Notice [30] Regarding Joint Stip.); *see* http://www.hillarythemovie.com (last visited Jan. 11, 2008) (offering *The Movie* on DVD for $23.95 and promoting screenings of the film in seven movie theaters across the country). *The Movie*'s release date coincides with the dates when many states will hold primary elections or party caucuses. Senator Clinton is a presidential candidate in those states. (Am. Compl. ¶ 17.) Citizens intends to fund at least three television advertisements—two 10-second advertisements, "Wait"[2] and "Pants,"[3] and one 30-second advertise

---

[2] The script for the television advertisement, "Wait" reads as follows:

ment, "Questions"[4]—to coincide with the release of its

[Image(s) of Senator Clinton on screen]

"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie."

[Film Title Card]

[Visual Only] Hillary: The Movie.

[Visual Only] www.hillarythemovie.com

[3] The script for the television advertisement, "Pants" reads as follows:

[Image(s) of Senator Clinton on screen]

"First, a kind word about Hillary Clinton: [Ann Coulter Speaking & Visual] She looks good in a pant suit."

"Now, a movie about the everything else."

[Film Title Card]

[Visual Only] Hillary: The Movie.

[Visual Only] www.hillarythemovie.com

[4] The script for the television advertisement, "Questions" reads as follows:

[Image(s) of Senator Clinton on screen]

"Who is Hillary Clinton?"

[Jeff Gerth Speaking & Visual] "[S]he's continually trying to redefine herself and figure out who she is . . ."

[Ann Coulter Speaking & Visual] "[A]t least with Bill Clinton he was just good time Charlie. Hillary's got an agenda . . ."

[Dick Morris Speaking & Visual] "Hillary is the closest thing we have in America to a European socialist . . ."

"If you thought you knew everything about Hillary Clinton . . . wait til you see the movie.

[Film Title Card]

[Visual Only] Hillary: The Movie. In theaters [on DVD] January 2007.

[Visual Only] www.hillarythemovie.com

movie. (*Id.* Ex. 1.) The [*3] advertisements promote *The Movie* and direct viewers to *The Movie*'s website for more information about the film and how to see or purchase it. (*Id.* ¶ 19.) If Senator Clinton becomes the Democratic presidential nominee, Citizens plans to broadcast the three advertisements and possibly other advertisements within 30 days before the Democratic National Committee Convention and within 60 days before the November general election—both periods are within BCRA's definition of an electioneering communication. (*Id.* ¶ 20); 2 U.S.C. § 434(f)(3)(A)(i)(II)(bb). Citizens has elected not to broadcast its advertisements pending resolution of this litigation. (Am. Compl. ¶ 26.) It has entered into negotiations to broadcast *The Movie* through the "Political Movies" component of a new nationwide VOD channel, "Elections 08," but has decided to forego the opportunity pending resolution of the current litigation because, according to Citizens, the broadcast would be banned under BCRA and, even if this were not so, the broadcast would require Citizens to disclose certain information and make certain statements as described below. (*Id.* ¶ 28–30.)

BCRA amended the Federal Election Campaign Act of 1971 ("FECA").[5] BCRA, Pub. L. No. 107–155, 116 Stat. 81 (2002) (codified at 2 U.S.C. § 431 et seq.). Passed in 2002, it represented "the most recent federal enactment designed to purge national politics of what was conceived to be the pernicious influence of big money' campaign contributions." *McConnell v. FEC*,

---

[5] Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 2 USC § 431 *et seq.*).

540 U.S. 93, 115 (2003) (internal citation omitted). BCRA introduced a new system for [*4] regulating what it termed "electioneering communications." Under BCRA § 201, an "electioneering communication" is:

> any broadcast, cable, or satellite communication which—
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within—
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate
>
> . . .

2 U.S.C. § 434(f)(3)(A). For presidential candidates, the communication must also be capable of being received by 50,000 or more persons. *See* 11 C.F.R. § 100.29(b)(3)(ii). Citizens recognizes that under this statutory definition, both its advertisements and a VOD[6] broadcast of *The Movie* would be electioneering

---

[6] The parties did not raise the issue of whether VOD was within the definition of "electioneering communication." However, a broadly worded FEC regulation defining "electioneering communications" indicates that VOD would be a "broadcast, cable, or satellite communication" because

communications. (Am. Compl. ¶¶ 17, 29.) Electioneering communications are subject to a host of restrictions imposed by BCRA. Three are relevant here: § 203, § 201, and § 311. Section 203 prevents corporations and labor unions from funding electioneering communications out of their general treasury funds, unless the communication is made to its stockholders or members, to get out the vote, or to solicit donations for a segregated corporate fund for political purposes. 2 U.S.C. § 441b(b)(2). This provision does not bar [*5] electioneering communications paid for out of a segregated fund that receives donations only from stockholders, executives and their families. 2 U.S.C. §§ 441b(b)(2)(C), (b)(4)(A).[7] Any electioneering communication that is not prohibited is subject to the disclosure requirements of § 201 and the disclaimer requirements of § 311, which are set out in part II.B.

Citizens' complaint, filed on December 13, 2007,[8]

---

it is "disseminated through the facilities of a . . . cable television system." *See* 11 C.F.R. §§ 100.29(b)(1), (b)(3)(i) (indicating that "broadcast, cable, or satellite communications" include communications "aired, broadcast cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system").

[7] Corporations and labor unions may also contribute to Political Action Committees, which are permitted to make electioneering communications. *See McConnell*, 540 U.S. at 204 (citing *FEC v. Beaumont*, 539 U.S. 146, 162–63 (2003)).

[8] On December 14, 2007, Citizens' motion for a three-judge district court was granted [14] pursuant to BCRA §

contains two major claims: (1) that § 203's prohibition of corporate disbursements for electioneering communications violates the First Amendment on its face and as applied to *The Movie* and to the 30-second advertisement "Questions"[9]; and (2) that BCRA § 201 requiring disclosure and § 311 requiring disclaimers are unconstitutional as applied to Citizens' three advertisements (and to *The Movie*, if Citizens broadcasts it in a manner that does not violate § 203).

II.

The court will not issue a preliminary injunction unless the movant shows that it has "1) a substantial likelihood of success on the merits, 2) that it would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction." *Omar v. Harvey*, 479 F.3d 1, 18 (D.C. Cir. 2007) (citing *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 [***6**] F.3d 738, 746 (D.C. Cir. 1995)). Granting injunctive relief is an "extraordinary and drastic remedy," and it is the movant's obligation to justify, "by a clear showing," the court's use of such a measure. *Mazurek*

---

403 and 28 U.S.C. § 2284. On January 10, 2008, the three-judge court held an expedited hearing on the motions for preliminary injunctions.

[9] Plaintiff's challenge regarding the prohibition of "Questions" will be denied as moot. The FEC, in its filings and at oral argument, conceded that the advertisement is exempt from the Prohibition. (Opp'n to 2d Mot. for Prelim. Inj. at 17.)

v. Armstrong, 520 U.S. 968, 972 (1997).

A.

We will analyze first Citizens' likelihood of prevailing on the merits of its claims regarding *The Movie*. In *McConnell*, the Supreme Court upheld § 203 on its face, rejecting claims that the financing of "electioneering communications" constituting express advocacy or its functional equivalent were within the protection of the First Amendment. 540 U.S. at 203–09. *McConnell* did not, however, "purport to resolve future as-applied challenges." *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2661 (2007) (citation omitted) ("*WRTL*"). The Chief Justice's opinion in *WRTL* stated that an advertisement could not be considered the functional equivalent of express advocacy unless it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[10] *Id.* at 2667. To promote the objectivity of this analysis, courts are to disregard contextual evidence of the corporation's

---

[10] The parties agree, as do we, that the Chief Justice's formulation is now the governing test for the functional equivalent of express advocacy. Although the Court s opinion in *WRTL* was fragmented, the Chief Justice's opinion approved the judgment of the district court on the narrowest grounds. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation marks omitted).

intent in running an advertisement.[11] *See id.* at 2668.

Citizens wants us to enjoin the operation of BCRA § 203 as a facially unconstitutional [*7] burden on the First Amendment right to freedom of speech. The theory is that with respect to § 203, *WRTL* narrowed *McConnell* to such an extent that it "left the door open to facial invalidation based on the sort of circumstances that have now arisen." (2d Mot. for Prelim. Inj. Mem. at 2). For Citizens to prevail on this claim, we would have to overrule *McConnell*, which is to say that Citizens has no chance of prevailing. Only the Supreme Court may overrule its decisions. The lower courts are bound to follow them. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam).

With respect to Citizens's as-applied claims regarding *The Movie*, the first question under Chief Justice Roberts' *WRTL* opinion—and as it turns out, the last question—is whether the film is express advocacy or its functional equivalent. If it is, *McConnell* makes it likely that Citizens would not win on the merits of its claim that the First Amendment permits it to broadcast the movie within the electioneering communica-

---

[11] *WRTL* discounted evidence that included the corporation's other candidate-related advocacy, the timing of the advertisements, and the advertisement's reference to an Internet address that directed viewers to a website containing express advocacy against the election of candidates for federal office. 127 S. Ct. at 2668–69 (Opinion of Roberts, C.J.).

tions period as currently funded. Citizens contends that *The Movie* is issue speech and, as it stated in oral argument, that issue speech is any speech that does not expressly say how a viewer should vote. The trouble is that the controlling opinion in *WRTL* stands for no such thing. Instead, if the speech cannot be interpreted as anything other than an appeal to vote for or against a candidate, it will not be considered genuine issue speech even if it does not expressly advocate the candidate's election or defeat. *WRTL*, 127 S. Ct. at 2667.

The Movie does not focus on legislative issues. *See id.*; 11 C.F.R. § 114.15(b). *The Movie* references the election and Senator Clinton's candidacy, and it takes a position on her character, qualifications, and fitness for office. *See id.*; 11 C.F.R. § 114.15(b). Dick Morris, one [*8] political commentator featured in *The Movie*, has described the film as really "giv[ing] people the flavor and an understanding of why she should not be President." Dick Morris, Hillary's Threat, Address (Mar. 2007) (available at www.citizensunited.org/blog/?entryid=4563815). After viewing *The Movie* and examining the 73-page script at length, the court finds Mr. Morris's description to be accurate. *The Movie* is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her.[12] [*9] *The Movie*

---

[12] A selection of excerpts from the movie are indicative of the film's message as a whole and serve to demonstrate the difficulty that this court had in its ultimately unsuc-

cessful attempt to find a reasonable interpretation of *The Movie* that would take it out of the *WRTL* "functional equivalent to express advocacy" classification.

Excerpts include statements by the film's narrator, one of several political commentators or another interviewee stating:

"She's driven by the power. She's driven to get the power. That is the driving force in her life." (Am. Compl. Ex. 2 at 1.)

"She is the expert at not saying what she believes—she will run on attacking Republicans, and being the first woman president—oh isn't that amazing, she's a woman she can walk and talk." (*Id.*)

"She is steeped in controversy, steeped in sleaze, that's why they don't want us to look at her record." (*Id.* at 1–2.)

"Over the past 16 years Hillary Clinton has undoubtedly become one of the most divisive figures in America. How this makes her suited to unite the country as the next president is troubling to many." (*Id.* at 6.)

"I mean think of what it says about Hillary Clinton that she was willing to put up with his open philandering, with anything in a skirt who wanders before his eyesight—all for the power—at least with Bill Clinton he was just good time Charlie. Hillary's got an agenda and she's willing to put up with that to be [P]resident of the [U]nited [S]tates, she's got a to do list when she gets to the White House." (*Id.* at 21–22.)

"I think the American people have a right to as much of a public record as possible about Hillary Clinton. Those records should be released before the 2008 elections so that we can learn a lot more about exactly how much influence she had in the White House, what her positions were in the White House, and how she acted in the White House." (*Id.*

is thus the functional equivalent of express advocacy.

---

at 60.)

"Finally, before America decides on our next president, voters should need no reminders of [] what's at stake—the well being and prosperity of our nation." (*Id.* at 68–69.)

"It[ ]s been said and I agree with it that this is the most personal political choice that Americans make. They want, they—their personality traits, their—will they consider a person that they could trust, that they would like, that they were comfortable with, and that's [where] think Hillary Clinton as a candidate has great defects." (*Id.* at 69.)

"If she reverts to form, Hillary Clinton will likely be in the future what she has been in the past, which is a person, a woman, a politician of the left, and I don't think that's going to [be] good for the security of the United States." (*Id.* at 70.)

"I think we are at a very critical time in this country. I can tell you beyond a shadow of a doubt that uh, the Hillary Clinton that I know is not equipped, not qualified to be our commander in chief." (*Id.* at 71.)

"[T]his vote comes down to one thing: liberty. Do you believe in liberty or don't you? Economic liberty, free speech, protecting our borders, protecting our country from terrorism—the issue is liberty." (*Id.*)

"[W]e must not ever underestimate this woman. We must not ever understate her chances of winning. We mustn't be lolled into a state of security and complacency by the new found moderation that she likes to talk about. And we must never forget the fundamental danger that this woman [poses] to every value that we hold dear." (*Id.* at 72).

In sum, plaintiff's counsel's representation at oral argument that the movie did not exhort viewers to vote against Senator Clinton, is simply untrue.

See WRTL, 127 S. Ct. at 2667 (setting out the "functional equivalent" standard). As such, it falls within the holding of *McConnell* sustaining, as against the First Amendment, § 203 insofar as it bars corporations from funding electioneering communications that constitute the functional equivalent of express advocacy. There is no substantial likelihood that Citizens will prevail on its as-applied challenge with respect to *The Movie*. **[*10]**

B.

Citizens' proposed advertisements present a different picture. The FEC agrees that Citizens may broadcast the advertisements because they fall within the safe harbor of the FEC's prohibition regulations implementing *WRTL*. They did not advocate Senator Clinton's election or defeat; instead, they proposed a commercial transaction—buy the DVD of *The Movie*. *See WRTL*, 127 S. Ct. at 2667; 11 C.F.R. § 114.15(b). Although Citizens may therefore run the advertisements, it complains that requirements of § 201 and § 311 of BCRA, 2 U.S.C. §§ 434(f)(2), 441d, impose on it burdens that violate the First Amendment.

Section 201 is a disclosure provision requiring that any corporation spending more than $10,000 in a calendar year to produce or air electioneering communications must file a report with the FEC that includes—among other things—the names and addresses of anyone who contributed $1,000 or more in aggregate to the corporation for the purpose of furthering electioneering communications. §§ 434(f)(1), (2)(F); 11 C.F.R. § 104.20(c)(9). Section 311 is a disclaimer provision. 2 U.S.C. § 441d. For advertisements not authorized by a candidate or her political committee,

the statement "____ is responsible for the content of this advertising" must be spoken during the advertisement and must appear in text on-screen for at least four seconds during the advertisement. § 441d(d)(2). In addition, such advertisements are required to include the name, address, and phone number or web address of the organization behind the advertisement. § 441d(a)(3).

Citizens thinks that § 201 and § 311 are unconstitutional because its advertisements do not constitute express advocacy or the functional equivalent of express advocacy. The argument is that the Supreme Court's *WRTL* decision narrowed the constitutionally permissible scope of what could be considered an electioneering communication. Under Citizens' reading of *WRTL*, [*11] anything that is not express advocacy or not "susceptible of [a] reasonable interpretation other than as an appeal to vote for or against a specific candidate" cannot be constitutionally regulated by Congress under BCRA. *See* 127 S. Ct. at 2667.

We do not believe *WRTL* went so far. The only issue in the case was whether speech that did not constitute the functional equivalent of express advocacy could be banned during the relevant pre-election period. Although *McConnell* upheld the § 203 prohibition on its face, the Court left open the issue that was presented in *WRTL*, reserving it for decision on an as-applied basis. In contrast, when the *McConnell* Court sustained the disclosure provision of § 201 and the disclaimer provision of § 311, it did so for the "entire range of electioneering communications" set forth in the statute. *McConnell*, 540 U.S. at 196; *see also id.* at 230–31 (discussing § 311). Citizens's advertisements

obviously are within that range.

Although Citizens styles its argument as an as-applied challenge, it offers only one distinction between its advertisements and the mine-run of speech that constitutes electioneering communication under BCRA. The distinction, so goes the argument, is that Citizens' speech is constitutionally protected, as *WRTL* holds. [*Editor's Note: The following sentence was struck by the Errata, and footnote 13 was moved where indicated below.*] Whether the Supreme Court will ultimately adopt that line as a ground for holding the disclosure and disclaimer provisions unconstitutional is not for us to say.[13] We know that the Supreme Court has not adopted that line as a ground for holding the disclosure and disclaimer provisions unconstitutional, and it is not for us to do so today. And we know as well that in the past the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment. [*Editor's Note: Footnote 13 was moved by the Errata to here.*] *See FEC v. Mass. Citizens for Life*, 479 [***12**] U.S. 238, 259–62 (1986) (striking down a prohibition, and noting that the disclosure provisions will apply to the newly permitted speech); *Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290, 297–98 (1981) (same); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791–92 & n.32 (1978) (discussing how

---

[13] [*Editor's Note: The Errata changed the following "See" citation to a "But See" citation.*] *See Majors v. Abell*, 361 F.3d 349, 356–57 (7th Cir. 2004) (Easterbrook, J., dubitante).

disclosure provisions can help offset the coercive aspects of corporate speech).

The *McConnell* Court did suggest one circumstance in which the requirement to disclose donors might be unconstitutional as-applied—if disclosure would lead to reprisals and thus "impose an unconstitutional burden on the freedom to associate in support of a particular cause." 540 U.S. at 198. To this, the Court added that the plaintiff must show a "reasonable probability that the compelled disclosure of... contributors' names will subject them to threats, harassment, or reprisals." *Id.* (quoting *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 100 (1982)). Citizens' memorandum in support of its motion states that there may be reprisals, but it has presented no evidence to back up this bald assertion. In that respect, Citizens is thus in a similar position as the parties in *McConnell* who made the same assertion but presented no specific evidentiary support. *See* 540 U.S. at 199.

We therefore hold that Citizens has not established the requisite probability of prevailing on the merits of its arguments against the disclosure and disclaimer provisions—§ 201 and § 311, respectively.

C.

Citizens tells us that without a preliminary injunction it will not be able to broadcast *The Movie*, that it will have to disclose the identity of its contributors to the FEC if it runs the advertisements, and that some portion of the time it purchased for the advertisements would be consumed by the disclaimers BCRA requires. If Citizens had made more of a showing that it [*13] had a chance of prevailing in this court on the merits,

these kinds of harms might have warranted preliminary relief. But in the face of *McConnell*'s ruling that the disclosure and disclaimer provisions are constitutional and that the restriction on corporate speech advocating the defeat of a candidate does not violate the First Amendment, Citizens is unable to raise "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953); *see also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714–15 (D.C. Cir. 2001), *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986), *Washington Metro. Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

As to the remaining factors governing preliminary relief, we cannot say that enjoining enforcement of the BCRA provisions at issue would serve the public interest in view of the Supreme Court's determination that the provisions assist the public in making informed decisions, limit the coercive effect of corporate speech, and assist the FEC in enforcing contribution limits. *See McConnell*, 540 U.S. at 196, 205, 231.

* * *

Citizens' motion for preliminary injunction with respect to the § 203 Prohibition as applied to "Questions" shall be DENIED as moot as set forth in footnote 9 and shall be DENIED with respect to all other claims. A separate order shall issue this date.

Signed by United States Circuit Judge A. Raymond Randolph, and United States District Judges Royce C. Lamberth and Richard W. Roberts, on January 15, 2008.

[Doc. 40, filed Jan. 16, 2008]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS UNITED Plaintiff,	)	
	)	Civil Action No. 07-2240
v.	)	(ARR, RCL, RWR)
	)	(Three-Judge Court)
FEDERAL ELECTION COMMISSION, Defendant.	)	

ERRATA

This court's Memorandum Opinion [39] dated January 15, 2008 is amended as follows:

1. The third sentence of the second full paragraph on page 11 is stricken. This sentence read: "Whether the Supreme Court will ultimately adopt that line as a ground for holding the disclosure and disclaimer provisions unconstitutional is not for us to say."
2. Footnote 13 is moved to the end of the sentence beginning on page 11 that reads: "And we know as well that in the past the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment."

3. Footnote 13 is changed from a *See* citation to a *But See* citation.

SO ORDERED.

Signed by United States Circuit Judge A. Raymond Randolph, and United States District Judges Royce C. Lamberth and Richard W. Roberts, on January 16, 2008.

[Doc. 41, filed Jan. 16, 2008]

United States District Court
District of Columbia

Citizens United, ***Plaintiff,***	
v.	**Civil No. 07-2240-RCL**
Federal Election Commission, ***Defendant.***	THREE-JUDGE COURT

Notice of Appeal to U.S. Supreme Court

Notice is given that Plaintiff hereby appeals to the United States Supreme Court this Court's Order (Jan. 14, 2008; Doc. 38) denying Plaintiff's Motion for Preliminary Injunction (Doc. 5) insofar as the Order denies a preliminary injunction as to Count 1 (regarding disclosure requirements for Plaintiff's advertisements) of the Amended Verified Complaint for Declaratory and Injunctive Relief (Doc. 22). Appeal is taken

pursuant to 28 U.S.C. § 1253 (providing for direct appeal from interlocutory decisions of three-judge courts).

Respectfully submitted,

/s/ James Bopp, Jr.
James Bopp, Jr., D.C. Bar#CO0041
Richard E. Coleson*
Jeffrey P. Gallant*
Clayton J. Callen*
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/234-3685 facsimile
Counsel for Plaintiff
**pro hac vice motion granted*

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

---

2 U.S.C. § 434(f)(1)-(3)

§ 434. Reports

* * *

(f) *Disclosure of electioneering communications.*

(1) *Statement required.* Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $ 10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) *Contents of statement.* Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for

permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) *Electioneering communication.* For purposes of this subsection –

(A) *In general.*

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which –

(I) refers to a clearly identified candidate for Federal office;

(II) is made within –

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus

of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) *Exceptions.* The term "electioneering communication" does not include –

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure

under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii) (2 U.S.C. § 431(20)(A)(iii)).

(C) *Targeting to relevant electorate.* For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons–

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

---

2 U.S.C. § 441d

§ 441d. Publication and distribution of statements and solicitations; charge for newspaper or magazine space

(a) Whenever a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising, or whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising or makes a disbursement for an electioneering communication (as defined in section 434(f)(3) of this title)) (2 U.S.C. § 434(f)(3)), such communication -

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name and permanent

street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

* * *

(d) *Additional requirements*

* * *

(2) *Communications by others.* Any communication described in paragraph (3) of subsection (a) of this section which is transmitted through radio or television shall include, in addition to the requirements of that paragraph, in a clearly spoken manner, the following audio statement: "_____ is responsible for the content of this advertising." (with the blank to be filled in with the name of the political committee or other person paying for the communication and the name of any connected organization of the payor). If transmitted through television, the statement shall be conveyed by an unobscured, full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over, and shall also appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds.

BCRA § 403(a), 116 Stat. at 113-14

Sec. 403. Judicial Review

(a) Special Rules for Actions Brought on Constitutional Grounds. – If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and to the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by filing a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

11 C.F.R. § 100.29

§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).

(a) *Electioneering communication* means any broadcast, cable, or satellite communication that:

(1) Refers to a clearly identified candidate for Federal office;

(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and

(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

(b) For purposes of this section –

(1) *Broadcast, cable, or satellite communication* means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

(2) Refers to a clearly identified candidate means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

(3)(i) *Publicly distributed* means aired, broadcast,

cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system.

(ii) In the case of a candidate for nomination for President or Vice President, publicly distributed means the requirements of paragraph (b)(3)(i) of this section are met and the communication:

(A) Can be received by 50,000 or more persons in a State where a primary election, as defined in 11 CFR 9032.7, is being held within 30 days; or

(B) Can be received by 50,000 or more persons anywhere in the United States within the period between 30 days before the first day of the national nominating convention and the conclusion of the convention.

(4) A special election or a runoff election is a primary election if held to nominate a candidate. A special election or a runoff election is a general election if held to elect a candidate.

(5) Targeted to the relevant electorate means the communication can be received by 50,000 or more persons –

(i) In the district the candidate seeks to represent, in the case of a candidate for Representative in or Delegate or Resident Commissioner to, the Congress; or

(ii) In the State the candidate seeks to represent, in the case of a candidate for Senator.

(6)(i) Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or satellite system, shall be available on the Federal

Communications Commission's Web site, http://www.fcc.gov. A link to that site is available on the Federal Election Commission's Web site, http://www.fec.gov. If the Federal Communications Commission's Web site indicates that a communication cannot be received by 50,000 or more persons in the specified Congressional district or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication, so long as such information is posted on the Federal Communications Commission's Web site on or before the date the communication is publicly distributed.

(ii) If the Federal Communications Commission's Web site does not indicate whether a communication can be received by 50,000 or more persons in the specified Congressional district or State, it shall be a complete defense against any charge that a communication reached 50,000 or more persons when the maker of a communication:

(A) Reasonably relies on written documentation obtained from the broadcast station, radio station, cable system, or satellite system that states that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates);

(B) Does not publicly distribute the communication on a broadcast station, radio station, or cable system, located in any Metropolitan Area in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates); or

(C) Reasonably believes that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

(7)(i) Can be received by 50,000 or more persons means –

(A) In the case of a communication transmitted by an FM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's protected or primary service contour, that the population of the Congressional district or State is 50,000 or more; or

(B) In the case of a communication transmitted by an FM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the protected or primary service contour, that the population of the part of the Congressional district or State lying within the station's or network's protected or primary service contour is 50,000 or more; or

(C) In the case of a communication transmitted by an AM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's most outward service area, that the population of the Congressional district or State is 50,000 or more; or

(D) In the case of a communication transmitted by an AM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the station's or network's most outward service area, that the population of the part of the Congressional district or State lying within the sta-

tion's or network's most outward service area is 50,000 or more; or

(E) In the case of a communication appearing on a television broadcast station or network, where the Congressional district or State lies entirely within the station's or network's Grade B broadcast contour, that the population of the Congressional district or State is 50,000 or more; or

(F) In the case of a communication appearing on a television broadcast station or network, where a portion of the Congressional district or State lies outside of the Grade B broadcast contour –

(1) That the population of the part of the Congressional district or State lying within the station's or network's Grade B broadcast contour is 50,000 or more; or

(2) That the population of the part of the Congressional district or State lying within the station's or network's broadcast contour, when combined with the viewership of that television station or network by cable and satellite subscribers within the Congressional district or State lying outside the broadcast contour, is 50,000 or more; or

(G) In the case of a communication appearing exclusively on a cable or satellite television system, but not on a broadcast station or network, that the viewership of the cable system or satellite system lying within a Congressional district or State is 50,000 or more; or

(H) In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is 50,000 or more.

(ii) Cable or satellite television viewership is determined by multiplying the number of subscribers within a Congressional district or State, or a part thereof, as appropriate, by the current national average household size, as determined by the Bureau of the Census.

(iii) A determination that a communication can be received by 50,000 or more persons based on the application of the formula at paragraph (b)(7)(i)(G) or (H) of this section shall create a rebuttable presumption that may be overcome by demonstrating that –

(A) One or more cable or satellite systems did not carry the network on which the communication was publicly distributed at the time the communication was publicly distributed; and

(B) Applying the formula to the remaining cable and satellite systems results in a determination that the cable network or systems upon which the communication was publicly distributed could not be received by 50,000 persons or more.

(c) Electioneering communication does not include any communication that:

(1) Is publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications;

(2) Appears in a news story, commentary, or edito-

rial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. A news story distributed through a broadcast, cable, or satellite television or radio station owned or controlled by any political party, political committee, or candidate is nevertheless exempt if the news story meets the requirements described in 11 CFR 100.132(a) and (b);

(3) Constitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations;

(4) Constitutes a candidate debate or forum conducted pursuant to 11 CFR 110.13, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum;

(5) Is not described in 2 U.S.C. 431(20)(A)(iii) and is paid for by a candidate for State or local office in connection with an election to State or local office; or

(6) Is paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986. Nothing in this section shall be deemed to supersede the requirements of the Internal Revenue Code for securing or maintaining 501(c)(3) status.

---

11 C.F.R. § 110.11(a)-(c)

§ 110.11 Communications; advertising; disclaimers (2 U.S.C 441d).

(a) *Scope.* The following communications must include disclaimers, as specified in this section:

(1) All public communications, as defined in 11 CFR 100.26, made by a political committee; electronic mail of more than 500 substantially similar communications when sent by a political committee; and all Internet websites of political committees available to the general public.

(2) All public communications, as defined in 11 CFR 100.26, by any person that expressly advocate the election or defeat of a clearly identified candidate.

(3) All public communications, as defined in 11 CFR 100.26, by any person that solicit any contribution.

(4) All electioneering communications by any person.

(b) *General content requirements.* A disclaimer required by paragraph (a) of this section must contain the following information:

(1) If the communication, including any solicitation, is paid for and authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state that the communication has been paid for by the authorized political committee;

(2) If the communication, including any solicitation, is authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, but is paid for by any other person, the disclaimer must clearly state that the communication is paid for by such other person and is authorized by such candidate, authorized committee, or agent; or

(3) If the communication, including any solicitation, is not authorized by a candidate, authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee.

(c) *Disclaimer specifications*—(1) *Specifications for all disclaimers.* A disclaimer required by paragraph (a) of this section must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for and, where required, that authorized the communication. A disclaimer is not clear and conspicuous if it is difficult to read or hear, or if the placement is easily overlooked.

* * *

(4) *Specific requirements for radio and television communications paid for by other persons and not authorized by a candidate.* In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a communication not authorized by a candidate or a candidate's authorized committee that is transmitted through radio or television or through any broadcast, cable, or satellite transmission, must comply with the following:

(i) A communication transmitted through radio or television or through any broadcast, cable, or satellite transmission, must include the following audio statement, "XXX is responsible for the content of this advertising," spoken clearly, with the blank to be filled in with the name of the political committee or other

person paying for the communication, and the name of the connected organization, if any, of the payor unless the name of the connected organization is already provided in the "XXX is responsible" statement; and

(ii) A communication transmitted through television, or through any broadcast, cable, or satellite transmission, must include the audio statement required by paragraph (c)(4)(i) of this section. That statement must be conveyed by an unobscured full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over.

(iii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must also include a similar statement that must appear in clearly readable writing at the end of the communication. To be clearly readable, the statement must meet all of the following three requirements:

(A) The statement must appear in letters equal to or greater than four (4) percent of the vertical picture height;

(B) The statement must be visible for a period of at least four (4) seconds; and

(C) The statement must appear with a reasonable degree of color contrast between the background and the disclaimer statement. A disclaimer satisfies the color contrast requirement of this paragraph (c)(4)(iii)(C) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest type size used in the communication.